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Nos. 81-2147 and 81-2188

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO NATION, ET AL.

STATE OF MONTANA, ET AL., PETITIONERS

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

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QUESTIONS PRESENTED

1. Whether the disclaimer provisions in the federal enabling acts and state constitutions of Arizona and Montana preclude state courts from adjudicating the reserved water rights of Indian tribes in those states.

2. Whether, assuming concurrent federal and state jurisdiction, an Indian tribe's federal suit to determine its federal rights in a federal forum should be dismissed, for reasons of "wise judicial administration," pending completion of protracted state court proceedings involving thousands of state law claims.

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BRIEF FOR RESPONDENT SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

STATEMENT

The Salt River Pima-Maricopa Indian Community occupies a reservation of approximately 50,000 acres east of the urbanized Phoenix-Scottsdale area in central Arizona. The reservation was set aside by the Executive

Order of President Rutherford B. Hayes dated June 14, 1879. 1 C. Kappler, *Indian Affairs: Laws and Treaties* 806-807 (1904). The Pimas and Maricopas have traditionally engaged in desert irrigation agriculture and, accordingly, the reservation's southern boundary was designated as the middle of the Salt River.

The proceeding involving the Salt River Pima-Maricopa Indian Community was commenced by the filing on or about April 26, 1974, of a water rights adjudication petition by Salt River Valley Water Users' Association (I J.A. 26-29). The Water Users' Association operates the Salt River Project, a federal reclamation project, serving the Salt River Reservoir District, and it purports to represent the non-Indian lands within that District. Its petition seeks an adjudication of rights in the Salt River and tributaries above Granite Reef Dam excluding the Verde River and its tributaries. The petition was filed with the Arizona State Land Department and invoked its jurisdiction under the then state water code enacted in 1919.

The Salt River Reservoir District lies downstream of the Granite Reef Dam. Its lands therefore are not affected by this adjudication petition. The petition alleges that the water rights in the Reservoir District were adjudicated in a 1910 territorial court decree and that, between the water rights fixed in that decree and water appropriated by the Water Users' Association and the United States for the non-Indian lands in the Reservoir District, all the water of the Salt and Verde Rivers and their tributaries upstream of the Granite Reef Dam has already been appropriated. In other words, there is no water available for lands upstream of the Granite Reef Dam.

The lands upstream of the Granite Reef Dam subject to this adjudication petition are essentially all federal lands. In a memorandum filed in the District Court proceedings (I J.A. 33-98), the United States represented that the area described in the petition is approximately 6,300 square miles of which 96% is in federal ownership.

Approximately 49% of the area is held in trust by the United States for recognized Indian tribes; and 47% is National Forest land or Bureau of Land Management land (I J.A. 42, 91-98). In short, the petition carves out an area of federal land; it alleges that this land has no water right; and it seeks a determination of that allegation in state proceedings.

In February, 1979, the Arizona State Land Department served the petition on the Salt River Pima-Maricopa Indian Community and other affected parties by registered mail together with a notice and a form of statement of claim (I J.A. 162-169).

On March 7, 1979, the Salt River Pima-Maricopa Indian Community filed a complaint in the United States District Court in Phoenix against the State of Arizona and the Commissioner of the State Land Department, alleging that it had water rights in the Salt River reserved under federal law; that the State did not have subject matter jurisdiction over its water rights or personal jurisdiction over it; and praying for an injunction against further proceedings (I J.A. 159-169). Removal petitions and complaints filed by the other affected tribes are described in footnotes 9 and 10 in the Petition for a Writ of Certiorari (No. 81-2147). In March, 1979, the State of Arizona and the Water Users' Association filed motions to dismiss the complaints and to remand the adjudication petition back to the State Land Department (I J.A. 1, 129).

Promptly upon the filing of these pleadings in the District Court, the State Legislature repealed the 1919 water code and drew up a new code to replace it effective April 24, 1979. 1979 Session Laws of Arizona, Ch. 139. Section 38 of Ch. 139 repealed old Article 6 of Title 45 of the Arizona Revised Statutes; and Section 39 furnished a new Article 6, A.R.S. 45-251 to 45-260. Section 45-258 of the new code required the State Land Department to transfer all adjudication proceedings then pending to the Superior Court.

The motions to dismiss and to remand were argued before the District Court on September 21, 1979. The complaints were dismissed and the petition was remanded to the Superior Court by Opinion and Order filed on January 18, 1980 (81-2147 Pet. App. E-1 to E-15). There was no evidentiary hearing. The court made no finding of fact.

The Ninth Circuit reversed and remanded "for a determination of whether Arizona has obtained jurisdiction over the Indians pursuant to Public Law 280" (81-2147 Pet. App. A-9). The court observed that its holding on the disclaimer issue made it unnecessary to decide "whether dismissal under the doctrine of 'wise judicial administration' would have been proper if Arizona had not disclaimed jurisdiction over the Indians" (*id.* at A-10). The court noted, however, that "the district judge did not make findings on this issue and the record indicates significant differences between these cases and the *Akin* case" (*ibid.*).

SUMMARY OF ARGUMENT

The federal courts are and should remain the exclusive, or at the very least, the principal, forum for the adjudication of Indian reserved water rights.

The historical tradition of federal authority over Indian lands, the federal source of the water rights in question, the explicit congressional guarantee of a federal forum for cases brought by Indian tribes, and the federally mandated state disclaimers of jurisdiction over Indian lands all contribute to and support this conclusion.

In disclaimer states like Arizona, Congress has required, and the states have agreed, that federal jurisdiction and control over Indian lands should remain "absolute." Congress has not altered this federal requirement, and it precludes the Arizona state courts from adjudicating Indian land and water claims. That is why the Salt River Pima-Maricopa Indian Community filed this

action to prevent the State Land Department (or the Superior Court) from determining the Tribe's federally reserved rights.

Even if the Court holds that, notwithstanding the federal and state disclaimers, the Arizona courts have concurrent jurisdiction over Indian water claims, the federal courts should still remain the principal and preferred arbiter of Indian rights. Tribes that seek adjudication of their federal rights in federal actions filed before or promptly after the beginning of a state general stream adjudication should be permitted to pursue their claims in federal court, to which the tribes have expressly been promised access. The ensuing federal decrees can then be incorporated into the relevant state proceedings, as Arizona law explicitly contemplates.

ARGUMENT

I

FEDERAL AND STATE DISCLAIMERS OF JURISDICTION PROHIBIT THE ARIZONA STATE COURTS FROM ADJUDICATING INDIAN WATER RIGHTS

Arizona's state courts do not have jurisdiction to determine the federal reserved water rights of the respondent Indian tribes. The disclaimer provisions in both the federal Enabling Act and the Arizona Constitution vest "absolute jurisdiction and control" over such matters in the Congress of the United States. The Enabling Act specifies that this absolute prohibition of state jurisdiction is "irrevocable without the consent of the United States *and* the people of [Arizona]" (emphasis added). Neither Congress nor the people of Arizona have given such consent. Accordingly, as a matter of both federal and state law, the Arizona state courts are precluded from adjudicating Indian water rights.

The tribes' argument regarding the federal and state disclaimer provisions has two parts. The argument

focuses first on the federal Enabling Act, pursuant to which Arizona was admitted into the Union in 1910. That statute contains Congress' explicit insistence that Arizona disclaim all jurisdiction over Indian lands within its borders. Neither the McCarran Amendment, nor the *Akin* decision, nor anything else that has happened since 1910, revokes or repeals the Enabling Act's disclaimer requirement. That requirement bars Arizona's courts from deciding the Indians' rights.

The second part of the tribes' disclaimer argument focuses on the Arizona Constitution. Even if Congress has somehow terminated the Enabling Act's federal disclaimer requirement—which it has not—the state Constitution's disclaimer provision remains in effect. That constitutional provision is binding on the Arizona courts, regardless of congressional action.

A. The Federal Enabling Act

1. *Language and History*

Like most states other than the original thirteen colonies, Arizona was permitted to join the Union by a federal statute that specified the terms of admission. Section 20 of the federal Enabling Act for Arizona (36 Stat. 569), adopted by Congress in 1910, required the proposed state to enact a binding ordinance stipulating, *inter alia*, that the people of the State

(a) "*forever disclaim all right and title*" to all lands "owned or held by any Indian or Indian tribes * * *," *and*

(b) agree and declare that "until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and *under the absolute jurisdiction and control* of the Congress of the United States" (emphasis added).

Under the federal Enabling Act, the required ordinance was to be "irrevocable without the consent of the United States and the people of said State * * *."

The plain language of the Enabling Act flatly excludes state jurisdiction over Indian lands. Nothing in the Act suggests there is an exception for state court adjudication of Indian claims to water on Indian land. On the contrary, the Act provides that the jurisdiction and control of the federal government are absolute.

Congress did not impose this requirement capriciously or in an effort to punish the people of Arizona. Rather, it acted to discharge the nation's solemn, pre-existing treaty obligation to the Indians. The federally-imposed disclaimer provision stems from peace treaties between the United States and Indian tribes in which the Indians agreed to submit to federal law and the United States agreed to retain exclusive jurisdiction and control over, and to be responsible for the protection of, reservation lands. For example, in the 1852 treaty with the Apache Nation, the Indians acknowledged and declared "that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States" (10 Stat. 979). The Navajo Treaty of 1849 announced that the tribe was placed "under the exclusive jurisdiction and protection" of the United States (9 Stat. 974). The 1868 treaty with the Navajo Nation likewise has been held, on historical grounds, to preclude extension of state law to Indians on the reservation. See, *e.g.*, *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 173-175 (1973); *Williams* v. *Lee*, 358 U.S. 217, 220-222 (1959).

As this Court said in *Rice* v. *Olson*, 324 U.S. 786, 789 (1945), "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." See also *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union"); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756 (1866); *United States* v. *Kagama*, 118 U.S. 375, 383-385 (1886).

Thus, the common understanding in the 19th century was that Indian tribes accepting reservations from the United States thereby embraced, and were entitled to the protection of, exclusive federal jurisdiction. Indeed, in many instances (including most of the reservations involved in these actions), the lands reserved for an Indian tribe were not within any state that existed at the time. The unavailability of state jurisdiction was a natural consequence, and nothing suggested that the exclusivity of federal jurisdiction would terminate once states were created out of the territories surrounding the reservations.

Some uncertainty was created, however, by this Court's decision in *United States* v. *McBratney*, 104 U.S. 621 (1882). That case involved the murder of one non-Indian by another on the Ute reservation in Colorado. The question was whether the defendant could be tried in federal court. The Ute reservation had been created by treaty in 1868—a treaty very similar to the Navajo treaty of the same year. Compare 15 Stat. 619 with 15 Stat. 667. The Court recognized that the treaty contemplated only federal jurisdiction. 104 U.S. at 622, 624. But, the Court observed, when Colorado entered the Union eight years later, the enabling acts enacted by Congress did not explicitly reserve exclusive federal jurisdiction over the reservation. *Id.* at 623-624. For this reason, the Court held, the reservation "is no longer within the sole and exclusive jurisdiction of the United States," and the federal courts have no jurisdiction to punish offenses committed on the reservation by non-Indians against non-Indians. *Id.* at 624. The opinion carefully added (*ibid.*) that the case did not present, and the Court did not decide, any question concerning

> the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians.

McBratney thus established that federal jurisdiction over the Indian reservation was initially exclusive, but the case raised some doubt regarding the nature of federal jurisdiction over Indian affairs in the wake of Colorado's statehood. Both by its actual result and by its reservation of all Indian questions, *McBratney* implied at least the possibility that the creation of new states would be held somehow to diminish federal jurisdiction over Indian lands or to render that jurisdiction concurrent with state power.

Congress was apparently troubled by this possibility, and it chose not to leave the matter to judicial resolution. In authorizing the admission of new states after *McBratney*, Congress included in the relevant enabling acts the requirement that the new states disclaim all right and title to Indian lands and that they acknowledge absolute federal jurisdiction and control of such areas.

The first federal disclaimer requirement appeared in 1889, in the first enabling act passed after *McBratney*. The statute covered four proposed states, including petitioner Montana. 25 Stat. 677. The disclaimer requirement in the 1910 Enabling Act for Arizona is virtually identical to the corresponding provision in the 1889 statute. Congress adopted these provisions to eliminate the uncertainty created by *McBratney*, to make clear that exclusive federal jurisdiction over Indian lands would not be affected by the admission of new states whose boundaries included Indian reservations, and thereby to implement the nation's treaty commitments to the Indians.

In short, the language and history of the Enabling Act establish that Congress intended to—and did—prohibit Arizona from asserting jurisdiction over Indian claims to water on the reservation.

2. *The Spurious Distinction Between "Proprietary" and "Governmental" Interests*

Notwithstanding the above, petitioners argue that the federal disclaimer requirements were never intended to do anything more than compel the new states to renounce

any ownership or title claims that they may have had to Indian lands. 81-2147 Pet. Br. 24-32; 81-2188 Pet. Br. 13-17. They argue that the federal disclaimers left the states free to regulate Indian lands and adjudicate Indian rights, as long as the states did not challenge the Indians' title to their treaty lands. According to petitioners, the federal enabling acts sought to limit the "proprietary" or ownership interests that the states could assert, but not the "governmental" or regulatory interests.

The spurious distinction advocated by petitioners has no basis in the language or legislative history of the disclaimer provisions, and it is not supported by the decisions of this Court.

As noted above (see page 6, *supra*), the disclaimer requirement in the Arizona Enabling Act contains two parts. First, the new state was required to disclaim all right and title to Indian lands. Second, it was required in addition to agree that such lands would remain under the "absolute jurisdiction and control" of Congress. If the disclaimer provisions had been intended to affect only the state's "proprietary" interests, the second part of the provisions would have been superfluous. The first part alone would have accomplished the limited purpose that petitioners attribute to Congress.

Moreover, the required disclaimer of "right and title" applies to both Indian lands and "unappropriated and ungranted public lands * * *;" on the other hand, the state's acknowledgment that Congress retains "absolute jurisdiction and control" applies only to Indian lands. Congress differentiated between the two parts of the disclaimer provision and intended that they produce separate effects.

Furthermore, immediately following the disclaimer provision, the Enabling Act contains a provision explicitly authorizing the new state to tax certain Indian lands, namely, "lands owned or held by any Indian who has severed his tribal relations * * *." Such a provision

would not have been needed if the disclaimer itself did not apply to state governmental, as well as proprietary, interests and did not thereby preclude state regulation and taxation of Indian lands. The language and structure of the disclaimer provision is thus inconsistent with petitioners' position.

So is the historical evidence. Disclaimer provisions were included in the federal enabling acts in response to this Court's decision in *McBratney*. That case was concerned solely with the division of jurisdiction between federal and state courts; it had nothing to do with state challenges to the ownership of Indian lands. Given this impetus for the disclaimers, it would be surprising, to say the least, if the statutes dealt solely with state claims to title of Indian lands and had no bearing on the power of state courts to regulate and adjudicate matters relating to Indian lands. Petitioners' distinction between "proprietary" and "governmental" interests simply cannot be reconciled with Congress' motive for adopting the disclaimers. Those provisions were intended to settle the question reserved in *McBratney*; they were intended to confirm that the creation of new states would not affect the exclusivity of federal jurisdiction over Indian affairs on Indian lands. The disclaimers therefore were necessarily concerned not only with ownership and title, but also with government regulation and judicial power.

The foregoing textual and historical analysis is reinforced by this Court's decisions. The leading case is *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973), which involved the same Enabling Act, the same state Constitution, one of the same tribes, and one of the same treaties at issue here. In unanimously holding that Arizona may not impose its personal income tax on Navajos on the reservation, the Court relied on the disclaimers as evidence of Congress' belief that the State lacks jurisdiction over reservation Indians. *Id.* at 175. If petitioners' argument were correct that the disclaimers apply only to the states' "proprietary" interests, the dis-

claimers would have been irrelevant in *McClanahan*. Arizona's attempt to tax Indian income did not assert any claim to ownership of Indian land; it was, rather, a classic "governmental" activity that, according to petitioners' theory, should not have been affected by the disclaimers. *McClanahan* therefore reveals the flaws in petitioners' argument. See also *United States* v. *Rickert*, 188 U.S. 432, 440-441 (1903) (state may not tax reservation lands allotted to individual Indians).

Numerous other decisions of this Court have relied on the disclaimer provisions in holding that state courts lack jurisdiction over Indian affairs on the reservation. See, *e.g.*, *Fisher* v. *District Court*, 424 U.S. 382, 386 & n.8 (1976); *Williams* v. *Lee*, 358 U.S. 217, 220-223 & n.10 (1959); *Williams* v. *United States*, 327 U.S. 711, 714 & n.10 (1946). Like *McClanahan*, these decisions are inexplicable if, as petitioners contend, the disclaimers are limited to the states' "proprietary" interests.

Congress too has manifested its understanding that the enabling act disclaimers apply to state "governmental" actions and, in particular, to state court jurisdiction over Indian matters. In 1953, Congress expressly authorized disclaimer states to assume civil and criminal jurisdiction over reservation Indians. (The statute cannot change the result in this case because it contains an explicit exception prohibiting state court adjudication of the ownership or right to possession "of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States * * *.") Section 6 of Public Law 83-280 announced that the United States would consent to state jurisdiction "[n]otwithstanding the provisions of any Enabling Act for the admission of a State" (67 Stat. 588). If the enabling act disclaimers did not preclude state jurisdiction over cases involving Indians on the reservation, Section 6 of Public Law 280 would have been unnecessary. Enactment of the statute thus showed that Congress understood that, without the

consent of the United States, the courts of disclaimer states lacked the power to decide cases involving reservation Indians.

Washington v. *Yakima Indian Nation*, 439 U.S. 463 (1979), would have been a useless exercise if the disclaimers were limited to proprietary matters. In *Yakima*, Washington sought to assert some civil and criminal jurisdiction over Indian reservations within its boundaries. The State readily acknowledged that modification of its constitutional disclaimer was necessary to accomplish that end. This Court was asked to decide, and it decided, whether Washington had done what was necessary to repeal its constitutional disclaimer in accordance with Public Law 280. If petitioners were correct that the disclaimers do not reach governmental activities, resolution of the question presented in *Yakima* would not have been necessary.

In attempting to counteract the language and history of the disclaimer provisions, the dispositive decisions of this Court, and the evidence of congressional understanding provided by Public Law 280, petitioners cite four cases, none of which supports their position. *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962), and *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), both involved state jurisdiction over Indian activities *outside* the reservation. (The Indians in *Kake* did not even have a reservation.) This Court in *McClanahan* has already rejected the argument petitioners now advance based on *Kake*. *See* 411 U.S. at 176 n.15. Petitioners' third case, *Draper* v. *United States*, 164 U.S. 240 (1896), is no more helpful to their cause. It involved exclusively *non-Indian* activities on a reservation; such activities have long been considered outside the scope of the disclaimers. See *Donnelly* v. *United States*, 228 U.S. 243, 271-272 (1913) (distinguishing *Draper* as inapplicable to crimes committed by or against Indians). Finally, *Puyallup Tribe* v. *Washington Department of Game*, 433 U.S. 165 (1977), involved activities on reservation lands that the tribe

itself had already alienated in fee simple absolute. Moreover, this Court had already held in a previous proceeding that the Indians' treaty right to fish on such lands was neither exclusive nor unlimited. 391 U.S. 392, 398 (1968); see also 433 U.S. at 175-177.

In short, the cases cited by petitioners are inapposite, and petitioners have not cited any case that deals with state court jurisdiction over Indian land or water disputes. Petitioners have simply failed to support their contention that the disclaimer provisions do not affect state court jurisdiction but concern only the states' "proprietary" interest in Indian lands.

3. *The McCarran Amendment Did Not Affect the Enabling Act Disclaimers*

Petitioners primarily contend that, even if the enabling act disclaimers at one time precluded Arizona's courts from adjudicating Indian water rights, the McCarran Amendment removed any such impediment. Characterizing the McCarran Amendment as an "exercise" of the very jurisdiction reserved to Congress in the enabling act disclaimers (81-2147 Pet. Br. 13-14, 21, 24), petitioners maintain that Congress thereby deliberately surrendered to the states a significant portion of its "absolute jurisdiction and control" over Indian lands. The argument is erroneous; it reads far more into the Amendment than Congress ever said or intended. Although petitioners speak in terms of an exercise of Congress' exclusive jurisdiction, their argument is nothing more than a thinly veiled assertion that Congress intentionally repealed or revoked the enabling act disclaimers as far as water rights are concerned. The evidence needed to support such a theory of implied repeal is entirely missing.

Enacted in 1952, the McCarran Amendment is a simple, clear, narrow statute. It waives the sovereign immunity *of the United States* "in any suit * * * for the adjudication of rights to the use of water of a river

system or other source" (43 U.S.C. 666). The Amendment does not mention Indians, Indian tribes, Indian reservations, or Indian water rights. It does not mention or purport to modify disclaimer provisions in federal enabling acts or state constitutions. It does not mention or purport to affect the subject matter jurisdiction of any court. Surely if Congress had intended to revoke or repeal provisions in numerous federal statutes, to change significantly the allocation of power between federal and state courts, and to rescind unilaterally the provisions of numerous Indian treaties, it would have done so explicitly rather than through the cryptic device of a waiver of the United States' sovereign immunity.

Subsequent legislative enactments make it clear that Congress had no such intention.

In 1953, barely a year after passage of the McCarran Amendment, Congress enacted Public Law 280, a comprehensive statute designed, *inter alia*, to prescribe the procedure by which disclaimer states could assume certain civil and criminal jurisdiction over Indian lands. Congress was careful to specify, however, that the jurisdiction made available by Public Law 280 did not include the power to adjudicate the ownership of "any real or personal property, including water rights, belonging to any Indian or any Indian tribe" (67 Stat. 589). If Congress, through the McCarran Amendment, had conferred that power on disclaimer states only one year earlier, Congress would hardly have taken such pains to exclude it from Public Law 280.

Likewise, in the Indian Civil Rights Act of 1968, Congress again excluded the power to adjudicate Indian water rights from the civil jurisdiction that disclaimer states were permitted to assume. 25 U.S.C. 1322(b). Congress thus once again manifested its belief that the McCarran Amendment had not already granted such jurisdiction to state courts in disclaimer states.

Petitioners argue, however, that the McCarran Amendment was intended to permit a complete adjudication of

water rights in state court. That purpose, they say, could be accomplished only if state courts were permitted to adjudicate Indian water rights. Hence, they conclude, Congress must have intended—via the McCarran Amendment—to repeal the disclaimer provisions of the enabling acts (81-2147 Pet. Br. 14-24; 81-2188 Pet. Br. 20-23). The simple fact, though, is that Congress did not address Indian rights when it enacted the McCarran Amendment. Nor did Congress mention or give any thought to disclaimers or enabling acts.

Contrary to petitioners' contention, the McCarran Amendment does not focus exclusively, or even primarily, on general stream adjudications. Congress was principally concerned with arranging for the United States to be bound in cases brought to determine the rights of one or more individual users of water in a particular stream. Congress did not seek to ensure that the rights of *all* users would always be determined in a single proceeding. It sought only to ensure that a judicial declaration of one or more users' rights would be effective against the United States, as well as against all other claimants of water rights in a stream. The emphasis was on binding the United States, not on determining every water user's rights whenever one such user sought a determination of his own holdings. See *Adjudication of Water Rights: Hearings before a Subcommittee of the Senate Committee on the Judiciary*, 82d Cong., 1st Sess. 2-20 (1951) (hereinafter, "Senate Hearings"). Indeed, the Deputy Attorney General, on behalf of the Department of Justice, objected to the measure on the ground that

> such a general waiver [of sovereign immunity] would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions, and the joinder of the United States in many actions in all of which it would be required to claim every right, which it could conceivably have or need, or

> subject itself to the possible loss of valuable rights on the theory of having split its cause of action.

August 3, 1951 Letter from Deputy Attorney General Ford to Senator McCarran, reprinted in S. Rep. No. 755, 82d Cong., 1st Sess. 7 (1951).

Although the legislative history of the McCarran Amendment is not extensive, its most salient feature for present purposes is clear: references to Indian rights were exceedingly scarce, and references to disclaimer provisions were non-existent.

Although eventually enacted as part of the 1953 Department of Justice Appropriation Act (66 Stat. 549, 560), the McCarran Amendment was initially introduced as a separate bill at the opening of the 82d Congress. The bill waived the sovereign immunity of the United States in the same terms ultimately enacted. S. 18, 82d Cong., 1st Sess. (1951). See 97 Cong. Rec. 86 (1951).

At no time during the legislative consideration of the McCarran Amendment did any Member of Congress suggest that the Amendment concerned state court adjudication of Indian water claims. Much less did any Member (or anyone else) ever intimate that the Amendment was intended to override disclaimer provisions in federal enabling acts or state constitutions. Indeed, as far as we have been able to determine, the words "disclaimer" and "enabling acts" were never once uttered by anyone in the course of congressional action on the McCarran Amendment.

Neither the Report of the Senate Judiciary Committee (S. Rep. No. 755, *supra*) nor the remarks of Senator McCarran explaining the bill (97 Cong. Rec. 12947-12948 (1951)) gave the slightest hint that the legislation involved Indian rights or disclaimers. In reviewing the reasons for the bill, the Senate Report did not even mention the reserved rights doctrine of *Winters* v. *United States*, 207 U.S. 564 (1908), and its application to In-

dian reservations. Not a word was uttered on the floor of either house to indicate that Indian rights were included in the United States' consent to suit or that disclaimers were affected by the legislation.[1]

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[1] One question concerning Indian rights (but not disclaimers) *was* asked on the Senate floor, but it referred to a section of the bill other than the waiver of sovereign immunity. The Senate Judiciary Committee, in response to a suggestion from Senator Magnuson, added a provision requiring the Secretary of the Interior to maintain a complete catalogue of all water rights claimed by any federal department, agency, or corporation. S. Rep. No. 755, *supra*, 1-2, 6-7. (This provision was dropped from the version of the bill that was ultimately enacted. See 98 Cong. Rec. 7893 (1953).) After Senator McCarran had explained the Committee's bill, Senator Chavez of New Mexico asked specifically whether Indian water rights held in trust by the United States would be included *in the proposed catalogue*. Senator McCarran seemed to answer negatively. 97 Cong. Rec. 12948 (1951). The complete colloquy was as follows:

> MR. CHAVEZ. I am happy the Senator from Nevada has made a statement explaining the purpose of the bill and the reasons for it. I have no objection to the bill. I know what it means to my State. But I should like to ask a question. If the Interior Department is made the repository of water rights, be they in the United States Government or in individual citizens, does that mean that Indian rights will also be integrated?
>
> MR. McCARRAN. No. All that the bill provides is that the Interior Department shall be a repository for the rights that have been acquired and are held by the United States, so that one seeking to determine water rights on a given stream may know what rights, if any, are claimed by the Government.
>
> MR. CHAVEZ. Does the Government claim those rights as the Government, or could it act as trustee, let us say, for a tribe of Indians?
>
> MR. McCARRAN. It could act as a trustee, I suppose. But, Mr. President, there is a deeper and more far-reaching purpose. If my time has not expired—
>
> THE PRESIDING OFFICER. The time of the Senator has expired.

Thus, the only reference to Indian rights by any Member of Congress during the legislative consideration of the McCarran Amendment focused on a provision that did not even pass. It did not involve state court jurisdiction or the repeal of any disclaimer.

Petitioners nonetheless insist that their tortured reading of the statute is supported by statements made to the Senate by two witnesses who opposed the bill: William H. Veeder, a Special Assistant to the Attorney General; and Acting Assistant Secretary of the Interior White. But neither of these fragmentary remarks deals with the disclaimer issue.

Mr. Veeder testified at a Senate subcommittee hearing on the bill (attended by only one Senator, Senator Watkins of Utah). Senate Hearings, *supra*, at 1, 37, 57. Mr. Veeder strongly opposed the bill, contending in the broadest possible terms that it would disrupt amicable federal-state relations in water matters, create enormous litigation problems, and threaten loss of valuable federal water rights. Attempting to bolster his argument by dire forecasts of complications that could result, as opponents of legislation often do, Mr. Veeder warned that joinder of the United States as a defendant could transform even the smallest action for a declaration of an individual user's rights into a general stream adjudication. He engaged in the following hyperbole (*id.* at 6-7):

> I know of no stream system of any size at all in which you wouldn't have a general adjudication if we were sued in connection, for instance, with the Forest Service rights. If we were sued we would have to prove our reclamation rights, our Indian rights, the Department of Defense rights, and those are becoming increasingly important. So you would have what might start out to involve 1 second-foot water or less, a situation that would explode into an adjudication of an entire watershed, whereas in regard to that 1 second-foot it would be very strange if you couldn't work out some kind of amicable adjustment without getting into the court.
>
> * * * * *
>
> Where the United States is a party the United States of necessity must come in and bring in, for instance its forest service rights, its soil conservation rights,

> its Indian rights, and when that occurs you must have every one in there or the decree will not be effective or you will be charged with splitting a cause of action or res judicata, one or the other.

Whatever weight might be given to that statement, Mr. Veeder did not mention—much less focus on—the disclaimer issue.

Acting Assistant Secretary White, in a letter to Senator McCarran, emphasized the number and variety of United States interests in the waters of the Nation's river systems. Among several examples of these interests, the letter mentioned "those which exist by virtue of the creation of Indian reservations under the doctrine of *United States* v. *Winters* [*sic*] (207 U.S. 564 (1908)) * * *." Senate Hearings, *supra*, at 67; S. Rep. No. 755, *supra*, at 8. The Department recommended that any waiver of immunity be limited to *general* adjudications of rights in a stream in which the United States claims an interest based on *state* law. In addition, the Department made several other recommendations for restricting the United States' consent to suit. The final one of these was that "the waiver should not extend to rights asserted by the United States for or on behalf of Indians." Senate Hearings, *supra*, at 68; S. Rep. No. 755, *supra*, at 8. Again, nothing was said about disclaimers.[2]

In sum, the language of the McCarran Amendment, its legislative history, and the subsequent congressional action in Public Law 280 and the Indian Civil Rights Act

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[2] The only other references to Indian rights (but not disclaimers) in the Senate hearings are not relevant here. On one occasion, Mr. Veeder mentioned Indian rights in the course of discussion of the meaning of the interstate compact among the states on the Colorado River. Senate Hearings, *supra*, at 12-13. The other reference appears in the prepared statement of the Nevada Attorney General (*id.* at 47-48). His comment concerned litigation involving water rights that were derived from *state* law and that had been purchased by the United States and were being used by the Bureau of Indian Affairs of the Department of the Interior.

of 1968, offer precious little support for the proposition that the Amendment displaced the disclaimer provisions in federal enabling acts or state constitutions. Special Assistant Veeder's testimony and Acting Assistant White's letter—neither of which mentions disclaimers—are extraordinarily slim reeds to carry the great weight petitioners place on them. And they are the words of dissenters. This Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation.'" *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964), quoting *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951). Likewise, the Court has been "extremely wary" of reliance on isolated bits of testimony in committee hearings. See, *e.g.*, *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13 n.9 (1972), and cases there cited.

To be sure, this Court in *Colorado Water Conservation District* v. *United States*, 424 U.S. 800 (1976) ("*Akin*"), relied on the Veeder testimony and the Interior Department letter to establish that the McCarran Amendment's waiver of sovereign immunity *is* broad enough to encompass suits against the United States in its capacity as trustee of Indian water rights. *Id.* at 811-812. But, even accepting that result as given, the Court said nothing in *Akin* about the McCarran Amendment's effect *vel non* on disclaimer provisions in federal enabling acts and state constitutions. The Court did not need to address that subject, because Colorado is not a disclaimer state. *Akin* therefore concerned only the scope of the McCarran Amendment's waiver, not its relationship to disclaimers in other federal statutes. Even if the meager evidence in the Amendment's legislative history is sufficient to support the outcome in *Akin*, it cannot sustain the far greater burden that petitioners now ask it to bear. Determination of the breadth of the United States' consent to

suit is one thing, but repeal or revocation of several federal disclaimer statutes is something else altogether.

Petitioners' construction of the McCarran Amendment ignores the rule, frequently repeated by this Court, that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918), quoted in *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976). See also *Antoine* v. *Washington*, 420 U.S. 194, 199-200 (1975), and cases there cited.

Moreover, petitioners' interpretation flies in the face of the numerous decisions of this Court disfavoring repeal by implication. See, *e.g.*, *Kremer* v. *Chemical Construction Corp.*, 102 S. Ct. 1883, 1890 (1982); *TVA* v. *Hill*, 437 U.S. 153, 189 (1978); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976). As the unanimous Court said in *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974), "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."

Here, the McCarran Amendment and the disclaimer provisions are not irreconcilable, and there most assuredly is no "affirmative showing of an intention to repeal." The McCarran Amendment did not *require* that Indian water rights be adjudicated in state court through a suit against the United States; at most, it removed the *sovereign immunity* barrier to that procedure. In disclaimer states, however, there is an independent reason why Indian water rights cannot be determined in state court: the federal enabling act and the state constitution disclaim jurisdiction over Indian lands.

There is not, in this Court's phrase, any "manifest incompatibility" between the McCarran Amendment and such disclaimers of state jurisdiction. *Kremer* v. *Chemical Construction Corp.*, *supra*, 102 S. Ct. at 1892. The

McCarran Amendment simply waives sovereign immunity in any court that would otherwise have subject matter jurisdiction over water rights suits. State courts in disclaimer states do not have such jurisdiction over suits to adjudicate Indian rights. The water rights of Indian tribes in disclaimer states can still be determined in federal court, and the McCarran Amendment's waiver of sovereign immunity permits that to be accomplished through an action against the United States. The earlier and later statutes can easily coexist and operate together.

4. Akin *Does Not Require that Disclaimer and Non-Disclaimer States Be Treated Identically*

Notwithstanding the dearth of legislative evidence, *Akin* decided that the McCarran Amendment's waiver of sovereign immunity extends to cases in which the United States is sued as the "owner" of water rights held in trust for an Indian tribe. Accordingly, in Colorado and other non-disclaimer states, Indian water rights can be adjudicated in state court through suits against the United States. Petitioners and the federal government now argue that, in light of *Akin*, the McCarran Amendment must be held to override the enabling act disclaimers. 81-2147 Pet. Br. 14-20; 81-2188 Pet. Br. 11-13, 20-23; U.S. Memorandum 12-16. Otherwise, they say, different rules will prevail in disclaimer and non-disclaimer states.

Elaborating on this theme, the government concedes that, under "the usual rules of construction," the McCarran Amendment cannot be said to have waived or repealed the enabling act disclaimers. U.S. Memorandum 11. The government further acknowledges that, under numerous decisions of this Court, "the familiar disclaimer clauses of Enabling Acts generally insulate Indian Reservation affairs from the jurisdiction of State authorities" (*id.* at 9-10). Nonetheless, the government concludes that there is "intolerable tension" between the *Akin* rule for non-disclaimer states and a different rule

for disclaimer states (*id.* at 12). The government reasons that the vast majority of Indian lands are in disclaimer states, that Congress never made a policy decision to retain exclusive jurisdiction over Indian lands in some states but not others, and that the decision in *Akin* therefore must determine the result here as well.

This misguided logic should be rejected forthwith. In its quest for an unnecessary symmetry, the government would allow the *Akin* tail to wag the disclaimer dog. *Akin* did not involve a disclaimer state. No party mentioned the disclaimer provisions, the Court did not consider them, and the Court's opinion did not suggest that the McCarran Amendment may have effected an implied repeal.

In light of its own past arguments, the government's current position is particularly puzzling and unpersuasive. In *Akin*, the government observed that Indians have traditionally been left free of state jurisdiction, that Congress ordinarily has permitted such jurisdiction only after careful scrutiny and only in the most clearly defined terms, and that Indian rights held in trust by the United States are different from other rights owned by the government itself. Accordingly, even in the non-disclaimer context, the government argued (U.S. Br. 54-57) that the McCarran Amendment waiver should not be construed to authorize suits against the United States in its capacity as trustee and thus to permit state court jurisdiction over Indian rights.

Following the rejection of this argument in *Akin*, the government supported the tribes in their contention that the disclaimer provisions still barred state courts in disclaimer states from exercising jurisdiction over Indian water rights. The government took this position before the federal district court in Montana and before the Arizona state court in this litigation. In addition, the government advanced the disclaimer argument before the United States Court of Appeals for the Tenth Circuit

in *Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116, cert. denied, 444 U.S. 995 (1979). See 77-1737 Br. for Appellees 5-15 (10th Cir.).

Now suddenly, with the zeal of the convert, the government joins petitioners in contending that Congress could not have intended to treat disclaimer and non-disclaimer states differently and that, given the result in *Akin*, the McCarran Amendment must be read as an implied repeal of the enabling act disclaimers.

There is no apparent reason why disclaimer and non-disclaimer states must be subject to the same rules. The simple fact is that Arizona, Montana, and the other disclaimer states are governed by statutes and constitutional provisions that do not apply in non-disclaimer states. We accept the government's suggestion (U.S. Memorandum 14) that the disclaimer provisions were initially intended merely to confirm what Congress already understood to be the case, *i.e.*, that the exclusivity of federal jurisdiction over Indian lands was not affected by the formation of new states from the territories that included the reservations. The fact remains, however, that this Court had raised a question about that very subject in *McBratney*, and, following that decision, when Congress admitted new states containing large Indian reservations, it went out of its way to require them to recognize its "absolute jurisdiction and control" over Indian lands. Congress plainly intended that, whatever the courts ultimately might decide with respect to states admitted before *McBratney*, no question should arise regarding the exclusivity of federal jurisdiction in disclaimer states, where most Indian lands were located.

The enabling acts and their disclaimer provisions are valid federal statutes. They have not been repealed, and they cannot be ignored simply to satisfy the desire for a uniform rule applicable to all western states. Moreover, as the government itself observes, the disclaimer states include more than 90 percent of Indian lands. They are

the rule, not the exception. And, as we have already stressed, neither the McCarran Amendment nor its legislative history so much as mentions the disclaimer provisions. In these circumstances, it would be bizarre indeed to strain to find in the McCarran Amendment an implied repeal of the enabling act disclaimers, just so the few disclaimer states could be treated like the many non-disclaimer states.

If there must be uniformity, the natural method of achieving it would be to conform the practice in non-disclaimer states with that in disclaimer states, not vice versa. Of course, that would require reconsideration of *Akin*. We believe that that would be a salutary task for the Court to undertake, in light of the disclaimer provisions and the paucity of evidence that the McCarran Amendment was intended to permit state court adjudication of Indian rights.

But, even if the Court is not inclined to reconsiduer *Akin*, Indian rights in disclaimer states can and should be restricted to adjudication in federal court, either through suits brought by the tribes themselves or by the United States as trustee, or through suits against the United States under the McCarran Amendment. That will accomplish the Amendment's principal objective of ensuring that all claimants, including the United States, are bound by the outcome of water rights litigation, and it will do so without denying the tribes their right to a federal forum.

The government suggests that different procedural rules in disclaimer and non-disclaimer states "would present at least an arguable question under the Equal Footing Doctrine" (U.S. Memorandum 14). The point is insubstantial.

It has long been settled that Congress can impose any condition, however unique, on a prospective state's admission to the Union, so long as it does not exceed the powers delegated to the national government by the Constitution.

Ex parte Webb, 225 U.S. 663, 689-691 (1912); *Coyle* v. *Smith*, 221 U.S. 559, 574 (1911); See also *Dick* v. *United States*, 208 U.S. 340, 353-354 (1908). Congress may perpetuate such special requirements even after a state's admission, as long as it acts pursuant to one or more of its enumerated powers. Because Congress has virtually unlimited authority to regulate Indian affairs, *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), laws according disparate jurisdictional treatment to Indians in various states or imposing different barriers to the assumption of state jurisdiction are clearly constitutional and therefore are not subject to challenge on equal footing grounds. This Court has recognized as much. *United States* v. *Chavez*, 290 U.S. 357, 365 (1933); *United States* v. *Sandoval*, 231 U.S. 28, 49 (1913).[3]

B. The State Constitution

Even if, contrary to all that we have said, the McCarran Amendment did remove the federal enabling act disclaimers as an obstacle to state court jurisdiction over Indian water rights, the disclaimer provision in Article XX, paragraph 4, of the Arizona Constitution still precludes adjudication of Indian claims in the courts of that state. The McCarran Amendment surely did not purport to confer on Arizona's courts subject matter jurisdiction that is expressly disclaimed by the governing state constitution. At most, Congress *permitted* disclaimer states to assume jurisdiction over Indians. The Arizona Constitution, however, still disclaims such jurisdiction and

[3] Numerous federal laws regarding Indians distinguish among the states. 25 U.S.C. 232 and 233 are applicable only to Indians and Indian reservations in New York State. Public Law 280 confers civil and criminal jurisdiction on five named non-disclaimer states, but two such states with Indian lands and populations, Colorado and Nevada, are excluded. 25 U.S.C. 304 subjects Indian schools in South Dakota to that state's minimum education requirements. See also 39 Stat. 865 (1916) (applicable to Winnebago and Omaha Indians of Nebraska); 62 Stat. 1161 (1948) (applicable to Sac and Fox Indians of Iowa).

thus precludes Arizona's courts from determining Indian water rights.

The Ninth Circuit in these cases held that the Arizona disclaimer means what it says and, unless repealed, remains binding on the state courts. If the McCarran Amendment *sub silentio* gave Arizona the right to assume jurisdiction over reserved Indian water rights, and if Arizona wishes to exercise that right, it may do so only through a proper repeal of its constitutional disclaimer. Such a repeal cannot be inferred from Arizona's silent response to a congressional enactment, the McCarran Amendment, which itself was silent on the issue. It ill behooves Arizona to suggest such cavalier treatment of its state constitution merely for the sake of achieving a procedural victory in this action.[4]

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[4] The Court of Appeals ordered a remand in the Arizona cases for a determination whether the State has repealed its constitutional disclaimer in accordance with Public Law 280, 25 U.S.C. 1322. As all parties agree, the latter statute explicitly excludes water rights cases and therefore cannot authorize a repeal of the Arizona constitutional provision in connection with the subject matter of this litigation. The Ninth Circuit's mistaken reference to Public Law 280, however, in no way detracts from the force of the court's holding that the state constitutional disclaimer remains effective unless and until duly repealed. Even if the McCarran Amendment or some other congressional action authorized the disclaimer states to assume jurisdiction over Indian water rights, Arizona would still need to demonstrate that it has satisfied all federal and state law requirements for an effective repeal of its constitutional disclaimer. See Arizona Const. Art. XXI, §§ 1, 2 ("Mode of Amending").

The foregoing matters need not be addressed in this case, if the Court accepts either the tribes' argument regarding the federal Enabling Act or their position regarding the correct interpretation and application of *Akin*. In either of those events, the Court should simply direct the District Court to exercise its uncontested jurisdiction over tribal actions to adjudicate federal reserved water rights in federal court. Only if the Court rejects both the Enabling Act argument and the tribes' treatment of *Akin* must the state constitutional question be considered. In that event—and because the question of Arizona's repeal of its state disclaimer provision has

The Arizona petitioners purport to have identified several federal statutes that extended state authority to Indian reservations without any requirement that the governing state constitutional disclaimers be repealed (81-2747 Pet. Br. 22-24). To the extent the cited statutes are relevant at all, however, they are readily distinguishable from the McCarran Amendment. The statutes cited by petitioners involve explicit congressional efforts to augment state authority over Indians. In this regard, they are unlike the McCarran Amendment, which purports to address only the sovereign immunity of the United States. By contrast to the statutes on which petitioners rely, the McCarran Amendment did not terminate or restrict federal jurisdiction and substitute state jurisdiction in its stead. At most, the McCarran Amendment allowed for the exercise of concurrent subject matter jurisdiction over Indian water rights in state and federal courts. It expressed no preference for state adjudication.

Moreover, with one exception, the cited statutes do not subject Indians to the coercive jurisdiction of state courts without their consent. 25 U.S.C. 311 simply permits the Secretary of the Interior, acting as the Indians' trustee, to allow state officials to open and establish highways on Indian lands "upon compliance with such requirements as [the Secretary] may deem necessary." The states have no authority to act on their own. Similarly, 25 U.S.C. 231 authorizes the Secretary to permit state officials to enforce their sanitation, quarantine, and compulsory school attendance laws on Indian reservations "under such rules and regulations as [the Secretary] may prescribe." Again, the states may not act on their own. Moreover, such enforcement is made subject to the consent of the tribal governing body of the reservation. The statutes permitting state taxation of minerals pro-

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not been decided in the courts below—this Court should remand for a determination whether a proper repeal has been effected.

duced on Indian reservations, 25 U.S.C. 398 and 398c, authorizes tribes to enter into mineral leases and then permit the states to tax the output of *non-Indian lessees*. All these laws condition the states' involvement on the voluntary acts of the federal government or the tribes and do not subject tribes to unwanted and coercive state court jurisdiction.

Similarly, the Arizona petitioners' reliance on the federal liquor law, 18 U.S.C. 1161, is misplaced. The consent of the tribes is required before state law may impose any limitations on the sale of liquor on an Indian reservation. 25 U.S.C. 357 authorizes extinguishment of Indian title by condemnation actions initiated by state or local authorities. The condemnation actions authorized by Section 357, however, must be brought against the United States in federal court. *Minnesota* v. *United States*, 305 U.S. 382 (1939).

The only statutes cited by the Arizona petitioners that subject Indians to the coercive jurisdiction of state courts are provisions of recent laws creating new Indian reservations. See 25 U.S.C. 761 *et seq.* (Utah Paiutes), 1300f *et seq.* (Pascua Yaqui). The lands that are the subject of the jurisdiction conferred by the federal statutes were in private ownership and subject to state jurisdiction at the time of the statutes' enactment. They are therefore outside the scope of protection afforded by the disclaimers, which apply to the tribal lands in existence at the time of statehood. *Organized Village of Kake* v. *Egan*, *supra*, 369 U.S. at 64-65.

All of the cited statutes deal specifically and exclusively with Indian affairs. None of them confers power over Indians by implication. In this respect they are unlike the McCarran Amendment, which applies generally to water rights claimed by the United States, does not mention Indians, and does not confer any power over Indians. It is one thing to say that the force of the disclaimers is overcome by an explicit grant of authority

over Indians to the states; it is quite another to conclude that the rights and immunities expressly guaranteed by the disclaimers are implicitly overcome by a statute that simply waives the sovereign immunity of the United States in some cases.

In short, none of the statutes on which petitioners rely supports the proposition that state silence, combined with a federal statute that does not mention Indians, can override a state constitution's express disclaimer of jurisdiction over Indian lands. The Arizona constitutional disclaimer, in and of itself, is therefore an insurmountable barrier to the exercise of state court jurisdiction over the claims of the respondent Indian tribes.

II

EVEN ASSUMING CONCURRENT STATE JURISDICTION, THE FEDERAL COURTS SHOULD ADJUDICATE INDIAN RESERVED WATER RIGHTS

Even assuming that, notwithstanding all we have said, the Arizona courts have concurrent jurisdiction over Indian water claims, the federal courts should still adjudicate timely suits by Indian tribes seeking a determination of their federal reserved rights. In this regard, the Salt River Pima-Maricopa Indian Community adopts and incorporates the arguments of the Navajo Nation and the Fort McDowell Mohave-Apache Indian Community, which were prepared through consultation among counsel for several respondent tribes.

Following a favorable disposition in this Court, the Salt River Pima-Maricopa Tribe will promptly file its own federal action to adjudicate its rights in the Salt River. The federal judgment in that action can then be incorporated into the state general stream adjudication, should that proceeding ever move forward.

CONCLUSION

The judgments of the Court of Appeals should be modified to direct the District Court to exercise its jurisdiction over federal suits in which Indian tribes timely seek to adjudicate their federal reserved water rights. As so modified, the judgments should be affirmed.

Respectfully submitted,

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